IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	No. 96-00540-01
v.	:	
	:	(CIVIL ACTION
DOMINGO ARANA	:	No. 01-4106)

MEMORANDUM AND ORDER

HUTTON, J. December 18, 2001

Currently before the Court is the Petitioner Domingo Arana's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Docket No. 246), the Government's Response to Defendant's Petition to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Docket No. 297), and Petitioner's Response to the Government's Response to Defendant's Petition to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Docket No. 299). For the reasons stated below, Petitioner's motion is denied.

I. FACTUAL BACKGROUND

On October 26, 1996, Domingo Arana ("Petitioner") was indicted, along with six co-defendants, for conspiracy to distribute cocaine, and possessing cocaine with intent to distribute in violation of 21 U.S.C. § 846 (Count I), and illegal use of a telephone in violation of 21 U.S.C. § 843 (Count II). On May 26, 1998, five of Petitioner's co-defendants pleaded guilty to

Count I, but Petitioner was not present, as he was a fugitive. After government agents arrested Petitioner in Florida, Petitioner executed a plea agreement on April 7, 1999 and also pled guilty to Count One. The Court held a sentencing hearing on September 23, 1999.

At the start of the sentencing hearing, Petitioner's trial counsel informed the Court that he had just received the revised Presentence Investigation ("PSI") Report and did not have the opportunity to review it with Petitioner. The Court then recessed the hearing to provide trial counsel the opportunity to review the revised PSI Report with Petitioner. When the hearing resumed, Petitioner stipulated that he was responsible for at least 34 kilograms of cocaine and 1.5 kilograms of crack cocaine. Petitioner was then sentenced to 135 months in prison.

Following the imposition of sentence, Petitioner filed an appeal of his conviction and sentence to the United States Court of Appeals for the Third Circuit. On July 13, 2001, the Judgment of the sentencing court was affirmed. See U.S. v. Domingo Arana, No. 99-1889 (3d Cir. July 13, 2001) (slip opinion). As a result, the Petitioner filed the instant motion pursuant to 28 U.S.C. § 2255 raising three grounds for relief all based on alleged ineffective assistance of counsel. The crux of Petitioner's argument is that errors of trial counsel lead him to stipulate to responsibility for 1.5 kilograms of crack cocaine.

II. DISCUSSION

A. Legal Standard

A prisoner who is in custody pursuant to a sentence imposed by a federal court who believes "that the sentence was imposed in violation of the Constitution or laws of the United States, . . . or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255 (West 2001). Prior to addressing the merits of the petitioner's claims, however, the court should consider if they are procedurally barred. See U.S. v. Essig, 10 F.3d 968, 976 (3d Cir. 1993). A petitioner under section 2255 is procedurally barred from bringing any claims on collateral review which could have been, but were not, raised on direct review. See Bousley v. U.S., 523 U.S. 614, 621, 118 S.Ct. 1604, 1610 (1998)(exception to procedural default rule for claims that could not be presented without further factual development); U.S. v. Biberfeld, 957 F.2d 98, 104 (3d Cir. 1992). Once claims have been procedurally defaulted, the petitioner can only overcome the procedural bar by showing "cause" for the default and "prejudice" from the alleged error. See Biberfeld, 957 F.2d at 104 (stating "cause and prejudice" standard).

Even though Petitioner did not raise an ineffective assistance of counsel claim on direct appeal, these claims are not barred from collateral review. In general, an ineffective assistance claim

which was not raised on direct appeal is not deemed procedurally defaulted for purposes of habeas review and such a claim is properly raised for the first time in the district court under section 2255. See U.S. v. Garth, 188 F.3d 99, 107 n.11 (3d Cir. 1999). In Garth, the Third Circuit explained that the general rule that an ineffective assistance claim which was not raised on direct appeal is not deemed procedurally barred is rooted in the fact that (1) trial counsel is often the same attorney on direct appeal and it would be unrealistic to expect or require that attorney to argue that his performance was constitutionally deficient, and (2) resolution of ineffective assistance claims often requires consideration of factual matters outside the record on direct appeal. Id. Therefore, the Court will consider the merits of Petitioner's claims.

The district court is given discretion in determining whether to hold an evidentiary hearing on a petitioner's motion under section 2255. See Gov't of the Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir. 1989). In exercising that discretion, the court must determine whether the petitioner's claims, if proven, would entitle him to relief and then consider whether an evidentiary hearing is needed to determine the truth of the allegations. See Gov't of the Virgin Islands v. Weatherwax, 20 F.3d 572, 574 (3d Cir. 1994). Accordingly, a district court may summarily dismiss a motion brought under section 2255 without a hearing where the

"motion, files, and records, 'show conclusively that the movant is not entitled to relief.'" U.S. v. Nahodil, 36 F.3d 323, 326 (3d Cir. 1994) (quoting U.S. v. Day, 969 F.2d 39, 41-42 (3d Cir. 1992)); Forte, 865 F.2d at 62. For the reasons outlined below, the Court finds that there is no need in the instant case for an evidentiary hearing because the evidence of record conclusively demonstrates that Petitioner is not entitled to the relief sought.

B. Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution provides that a criminal defendant is entitled to reasonably effective assistance of counsel. See U.S. Const. amend. VI. A petitioner's claim of ineffective assistance of counsel is governed by the standard promulgated by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). In Strickland, the Supreme Court stated that an ineffective assistance of counsel claim requires the defendant to show that their counsel's performance was defective and that the deficient performance prejudiced the defense. See id., 104 S.Ct. at 2064; see also Meyers v. Gillis, 142 F.3d 664, 666 (3d Cir. 1998) (stating that to be entitled to habeas relief, the defendant must establish ineffectiveness as well as resultant prejudice). Counsel's performance is be measured against a standard of reasonableness. In analyzing that performance, the court must make "every effort . . . to eliminate the distorting effects of

hindsight," and determine whether "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." See Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

Once it is determined that counsel's performance was deficient, the court must determine if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Id. at 694, 104 S.Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S.Ct. at 2068. Only after both prongs of the analysis have been met will the petitioner have asserted a successful ineffective assistance of counsel claim. Moreover, "judicial scrutiny of an attorney's competence is highly deferential." Diggs v. Owens, 833 F.2d 439, 444-45 (3d Cir. 1987). "[A]n attorney is presumed to possess skill and knowledge in sufficient degree to preserve the reliability of the adversarial process and afford his client the benefit of a fair trial." Id. at 445. "Nevertheless, if 'from counsel's perspective at the time of the alleged error and in light of all the circumstances' it appears that counsel's actions were unreasonable, the court must consider whether that error had a prejudicial effect on the judgment." Id. (citation omitted).

1. Failure to Request a Continuance of the Sentencing Hearing

Petitioner's first claim of ineffective assistance of counsel

is based upon his contention that his trial counsel failed to request a continuance of the sentencing hearing to allow Petitioner time to review the revised PSI Report. See Pet'r § 2255 Mot. at 11. As stated above, Petitioner's trial counsel informed the Court at the start of the sentencing hearing that he had just received the revised PSI Report and did not have the opportunity to review it with Petitioner. See Trans. of Sentencing at 2. The Court then recessed the hearing to provide trial counsel the opportunity to review the revised PSI Report with Petitioner. See id. at 3. When the Court resumed, the following colloquy occurred:

> THE COURT: Now, Mr. Gutierrez, have you had an opportunity to review the presentence report with your client?
>
> GUTIERREZ: Yes, we've had, Your Honor.

See Trans. of Sentencing at 2.

According to Petitioner, trial counsel was ineffective by not requesting a continuance and thereby "waived [Petitioner's] rights by not requesting a reasonable amount of days . . . in order to fully explain the changes to his client." See Pet'r § 2255 Mot. at 7. Due to the short period of time allotted to review the revised PSI Report, Petitioner asserts he did not understand the terms of the agreement. Petitioner contends that he was never involved in the sale of or distribution of crack cocaine. See id. at 12. Rather, trial counsel's actions were "designed to 'put [Petitioner]

on the spot' and force him to accept the government's plea offer." Pet'r Resp. to U.S. Resp. to Pet'r § 2255 Mot. at 1.

Trial counsel's failure to request a continuance of the sentencing hearing to further review the revised PSI Report with Petitioner does not approach the standard necessary to constitute ineffective assistance of counsel. To the contrary, trial counsel's actions at the hearing were well within the bounds of an objective standard of reasonableness. Clearly, a defendant is entitled to receive a revised pre-sentence report at least seven days before sentencing. See Fed. R. Crim. P. 32(b)(6)(C). In the instant case, Petitioner was not afforded the required seven days. However, Petitioner's allegations that trial counsel's failure to request a continuance was designed "to put him on the spot" regarding his stipulation to crack cocaine are fanciful at best.

The original PSI Report found that Petitioner was responsible for 144 ounces of crack cocaine. See PSI Report, ¶ 67. Based on this information, Petitioner was advised at his change of plea hearing that his base offense level could be level 38. Moreover, the United States Court of Appeals for the Third Circuit, in reviewing Petitioner's appeal of his sentence, found that the sentencing court did not err in finding Petitioner responsible for 1.5 kilograms of crack cocaine, or for not providing Petitioner sufficient time to review the PSI Report. See U.S. v. Domingo Arana, No. 99-1889, at 4 (3d Cir. July 13, 2001) (slip opinion).

Rather, the Third Circuit found:

> In recognition of [Petitioner's] concession [to 1.5 kilograms of crack cocaine], the government agreed to withdraw its recommendation for a supervisory role enhancement. The court accepted these stipulations, reduced [Petitioner's] base level two levels under the "safety valve" provision of U.S.S.G. § 2D1.1(b)(6), and further granted a three-level reduction for acceptance of responsibility in accordance with the plea agreement entered into by the parties. These reductions resulted in a base offense level of 33 and a guideline range of 135 to 168 months. The District Court sentenced [Petitioner] to 135 months imprisonment . . .

Id. at 4.

In assessing trial counsel's performance, the Court must be cognizant of all of the circumstances. See Strickland, 466 U.S. at 690, 104 S.Ct. at 2066. Here, Petitioner's original PSI Report, which was received in a timely manner, documented that Petitioner was responsible for 144 ounces of crack cocaine. See PSI Report, ¶ 67. As Petitioner concedes in his motion, the differences between the original and revised PSI were minimal. See Pet'r § 2255 Mot. at 8. "The new PSI was basically the same as the previous one except for some corrections and the fact that the calculations for the base offense level had been raised to 38 . .

." Id. Moreover, the Report did not contain any new information that required additional time for Petitioner and counsel to prepare a defense, obtain witnesses, or produce exculpatory evidence. Under these circumstances, trial counsel's failure to request a continuance was not so unreasonable as to constitute ineffective assistance of counsel. Rather, counsel's actions during the sentencing hearing fell well within the bounds of reasonable professional assistance.

2. Counsel's Failure to Request an Evidentiary Hearing on Drug Quantity

Next, Petitioner claims that his trial counsel was ineffective because counsel withdrew Petitioner's objections to the finding in the PSI Report that Petitioner was responsible for crack cocaine and failed to request and evidentiary hearing on the issue. See Pet'r § 2255 Mot. at 13; Pet'r Resp. to U.S. Resp. to Pet'r § 2255 Mot. at 4. Thus, the question before this Court is whether trial counsel's decision not to contest a finding that Petitioner was responsibility for 1.5 kilograms of crack cocaine renders counsel's performance "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066. Again, trial counsel's actions do not approach the standard necessary to establish ineffective assistance of counsel.

The evidence of record indicates that trial counsel made a strategic decision not to challenge drug quantity. Based upon the

Government's statement at Petitioner's change of plea hearing, which indicated that evidence would be brought against Petitioner to establish a drug quantity, counsel's decision appears to not only be within the range of competent assistance, but also appears to be quite prudent. The evidence presented by the Government to show that Petitioner was responsible for crack cocaine was a January 6, 1995 telephone conversation between Petitioner and his nephew, Jose Juan Arana. See U.S. v. Domingo Arana, No. 99-1889, at 7 n.1 (3d Cir. July 13, 2001) (slip opinion); see also Trans. Change of Plea Hearing at 2-3. That conversation clearly established that Petitioner knew of co-conspirator Terrence Gibbs' processing of powder cocaine into crack cocaine. Arana, No. 99-1889, at 7 n.1. In fact, when co-conspirator Jose Juan Arana requested an evidentiary hearing on this very issue, the trial court found, and the Third Circuit affirmed, that Jose Juan Arana was responsible for at least 1.5 kilograms of crack cocaine based on the January 6, 1995 telephone conversation. See U.S. v. Juan Jose Arana, No. 98-2010, at *6 (3d Cir. April 14, 1999) (slip opinion). Moreover, Petitioner admitted at that he participated in the conversation during his plea hearing. See Trans. Change of Plea Hearing at 3. For this Court to decide counsel's decision not to object or request an evidentiary hearing in relation to these facts were anything other than prudent would be to ignore the deference the Court is required to give to trial counsel's

decisions. See Strickland, 466 U.S. at 689, 104 S.Ct. at 2065.

3. Involuntary Guilty Plea

Petitioner's third and final claim of ineffective assistance of counsel rests on Petitioner's contention that his trial counsel provided him with "mis-advice" that rendered his guilty plea involuntary. See Pet'r § 2255 Mot. at 15. Again, this allegation is based solely on the fact that Petitioner stipulated to being responsible for 1.5 kilograms of crack cocaine. Petition fails to elaborate on this allegation, other than to state that he "plead based only on [his] attorney's advise" and was thereby mislead. See Pet'r § 2255 Mot. at 15.

"A plea is not voluntary or intelligent," and therefore unconstitutional, "if the advice given by defense counsel on which the defendant relied in entering the plea falls below the level of reasonable competence such that the defendant does not receive effective assistance of counsel." U.S. v. Loughery, 908 F.2d 1014, 1018 (D.C. Cir. 1990). Therefore, in order to succeed on this claim, Petitioner must again show that his counsel's performance "fell below an objective standard of reasonableness" by identifying specific "acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Strickland, 466 U.S. at 687-88. If such a showing is made, Petitioner must then demonstrate that the deficiencies in his representation were prejudicial to his defense. Id. at 692. He must show that

specific acts of his counsel were so egregious as to make the result of her guilty plea unreliable. Lockhart v. Fretwell, 113 S.Ct. 838 (1993); Gardner v. Ponte, 817 F.2d 183, 187 (1st Cir.), cert. denied, 484 U.S. 863, 108 S.Ct. 181, 98 L.Ed.2d 134 (1987).

Again, for the reasons indicated above, Petitioner is unable to make such a showing. The evidence that Petitioner was responsible for 1.5 kilograms of crack cocaine was substantial. Trial counsel acted well within the realm of professional reasonableness to advise his client to plea to such a charge based on the facts and circumstances in Petitioner's case.

III. CONCLUSION

In all three of his claims, Petitioner failed to show that his trial counsel's performance was defective and that the deficient performance prejudiced the defense. Accordingly, his claims for ineffective assistance of counsel fail to meet the test set forth by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). Therefore, Petitioner's § 2255 Motion is denied in its entirety. Moreover, a certificate of appealability will not issue because Petitioner has not made a substantial showing of the denial of a Constitutional right.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	No. 94-192-1
v.	:	
	:	(CIVIL ACTION
MIKE PEREZ	:	No. 00-4995)

O R D E R

AND NOW, this 18th day of December, 2001, upon consideration of the Petitioner Domingo Arana's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Docket No. 246), the Government's Response to Defendant's Petition to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Docket No. 297), and Petitioner's Response to the Government's Response to Defendant's Petition to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Docket No. 299), IT IS HEREBY ORDERED that Petitioner's motion is **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that a certificate of appealability is not granted because Petitioner has not made a substantial showing of the denial of a Constitutional right.

BY THE COURT:

_____
HERBERT J. HUTTON, J.